discharge of debts falling due from the testator's estate after his death – as, for instance, rent due after the testator's death for a house of which he was tenant from year to year.

As regards the amount disclosed in (f), I am of the view that the sum was rightly withheld from the plaintiff and the other beneficiaries pending the computation of income tax payment. Of course as executors and trustees, the defendants must exercise due care to see that the money wherever possible be invested in short term deposits.

The second issue appertains to the power of this court to ratify by way of supplemental order, a mere omissional irregularity by the defendants to obtain prior approval for what would have otherwise been lawful expenditure. As observed earlier, the defendants would have in normal circumstances been entitled to deduct all the expenses incurred by them as trustees. Somehow they missed the significance of this issue at the time when the order for distribution was made. There is no doubt that I would have, on the basis of the evidence now produced, sanctioned the expenditures if so requested. In *Re Scowby*,[2] it was held that the High Court has jurisdiction to make upon proof of new facts an order supplemental to an original order. Similarly in *Ford-Hunt* v *Raghbir Singh*,[3] Brightman J observed (at p 740) that:

> There is no doubt, if the plaintiffs had asked, an inquiry as to damages would have been added to the order for specific performance. The question is whether an inquiry can be directed now.

These cases are not directly on fours with our present application but to my mind they are nevertheless persuasive authorities to move me into making this supplemental order.

Whatever inconvenience caused to the plaintiff in this case has been compensated by costs.

Order accordingly.

Solicitors: *Chooi & Co; Jagjit Singh & Co.*

Reported by *Ng Sheau Jiuan*

Development & Commercial Bank Bhd v Tengku Noone Aziz bin Tengku Mahmood & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-2759-86
SITI NORMA YAAKOB J
28 JULY 1988

Banking – Guarantor sued for principal debtor's debt on overdraft facilities – Interest rate on overdraft increased without guarantor's consent or knowledge – Whether permissible by terms of overdraft – 'Until further notice' – Meaning of

The second defendant, who was being sued as a guarantor, appealed against an O 14 judgment obtained by the plaintiff. The second defendant contended, inter alia, that the increase in the rate of interest from 15% to 16% pa was made without his consent and knowledge.

Held, dismissing the appeal: (1) The term on the rate of interest payable states '15% pa until further notice'. The words 'until further notice' can only mean that the rate is subject to increase or decrease at the discretion of the plaintiff. There is no provision as to prior notice or that the consent of the second defendant needs to be sought before the plaintiff can exercise its right to revise the rate of interest.

(2) Clauses 1 and 15 of the guarantee give the plaintiff the power to treat the second defendant as a principal debtor and since the second defendant has not, until the appeal, raised any objection to the amount claimed, he had not raised any triable issue as to warrant upsetting the senior assistant registrar's order.

Teh Meng Teck for the second defendant/appellant.
VP Pradhan for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The second defendant in this suit is sued as a guarantor and on 12 February 1986, the senior assistant registrar allowed the plaintiff's application under O 14 and entered judgment against him for the sum of $1.25 million being the limit of the guarantee together with interest at 16% pa from 25 February 1986 to date of realization and costs. Against this decision, he has now appealed.

At the hearing before me, the second defendant sought to introduce a letter dated 19 September 1987 from Bank Negara wherein all banks in the country were encouraged to reduce their base lending rates in view of the economic recession in the country.

I had disallowed reliance on this letter, as it is persuasive in nature only and has no force of law whatsoever. Moreover it was issued after the cause of action had arisen and after the writ was filed.

Although in his affidavit, the second defendant raised a number of issues, before me he was quite content to confine them to only the following:

(1) The increase in the rate of interest from 15% to 16% pa was made without his consent and knowledge.

(2) No statement of accounts had been rendered by the plaintiff to him.

The rate of interest that has been agreed by the plaintiff with the principal debtor, the first defendant in this suit, on the overdraft extended to him is 15% pa. This is clearly stated in the plaintiff's letter dated 12 April 1982 approving the overdraft of $1.25 million and subject to the terms and conditions contained therein.

The term on the rate of interest payable states '15% pa until further notice' can only mean that the rate is subject to increase or decrease at the discretion of the plaintiff. There is no provision as to prior notice or that the consent of the second defendant needs to be sought before the plaintiff can exercise its right to revise the rate of interest.

This was never in issue before and it was not even raised before the senior assistant registrar but I notice that it was made an issue in an affidavit affirmed and filed on 11 February 1988, a day before the hearing before the senior assistant registrar.

In any event, had it been raised earlier I feel pretty sure that the plaintiff would have accommodated the second defendant by supplying him with the correspondence on the increase in the rate of interest as well as the statement of accounts.

As for the second defendant's objection that the guarantee itself makes no mention of interest, he only needs to look at cl 1 of the guarantee to realize that what he had guaranteed is repayment of the overdraft together with interest with monthly rests which had been extended to the first defendant pursuant to the terms and conditions contained in the plaintiff's letter of approval dated 12 April 1982. Since one of the terms allows the plaintiff the right to increase the rate of interest, I had considered there is no basis for the second defendant's objection as to the increased rate of interest charged by the plaintiff.

Clauses 1 and 15 of the guarantee also give the plaintiff the power to treat the second defendant as a principal debtor and since the second defendant has not until the appeal raised any objection to the amount claimed, I had considered that he had not raised any triable issue as to warrant me upsetting the senior assistant registrar's order. In any event the provisions of the guarantee itself are very clear in meaning and intent and what the plaintiff is claiming is the limit of the guarantee, following the default of the first defendant, plus interest at a rate which I had considered to be permissible under the terms of the letter of approval and the guarantee. To that end, I had dismissed the appeal of the second defendant with costs.

Order accordingly.

Solicitors: *Megat Najmuddin Leong & Co*; *Skrine & Co.*

Reported by *Ng Sheau Jiuan*

Development & Commercial Bank Bhd v Almas Motors Corporation (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C1752 OF 1984
VC GEORGE J
4 MARCH 1988

Contract – Guarantee – Action by bank against guarantors – Banking facilities secured by debenture – Debenture not crystallized – Whether bank was obliged to enforce charge under debenture before proceeding to enforce guarantee – Whether bank was negligent or in breach of implied warranty for not crystallizing debenture – Whether any impairment of security – Contracts Act 1950, ss 92 & 94

Banking – Banking facilities secured by debenture – Action by bank against guarantors – Debenture not crystallized – Whether bank was obliged to enforce charge under debenture before proceeding to enforce guarantee – Whether bank was negligent or in breach of implied warranty for not crystallizing debenture – Whether any impairment of security – Contracts Act 1950, ss 92 & 94

This is the third defendant's appeal against an O 14 judgment against him. The plaintiff bank had granted certain banking facilities to the first defendant company secured by a debenture by which all the assets of the first defendant company were charged to the bank. The second and third defendants are guarantors thereof. The debenture was not crystallized by the bank. The third defendant resisted the bank's claim against him and filed a defence and opposed the O 14 application where ss 92 and 94 of the Contracts Act 1950 were invoked.

Held, allowing the appeal: (1) Two aspects of the suggested defence merit consideration. First, there is the contention that there was an implied warranty that the bank was obliged to enforce the charge under the debenture before proceeding to enforce the guarantee. The second contention is that the bank, in not crystallizing the debenture and appointing receivers, was negligent on its part and also that the omission of the bank to appoint receivers amounts to the bank being guilty of a breach of an implied warranty or of a duty it owed to the guarantors.

(2) In the instant case there certainly was a debenture which was not caused to be crystallized. Whether that amounted to negligence or a breach of implied warranty or duty, and whether or not the third defendant had bargained away his rights preserved by ss 92 and 94 of the Contracts Act 1950, and in any event whether as a result there had been an impairment of the security, all provide triable issues.